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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSELITO MEZA,

Defendant and Appellant.

F075523

(Super. Ct. No. BF159065A)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Julie A. Hokans, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Smith, Acting P.J., Snauffer, J. and DeSantos, J.

A jury convicted appellant Joselito Meza of gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)/count 1); driving under the influence of alcohol causing injury (Veh. Code, § 23153, subd. (a)/count 2);<sup>1</sup> driving with a blood-alcohol content (BAC) of .08 percent or greater causing great bodily injury (§ 23153, subd. (b)/count 3); and failing to stop at the scene of an accident resulting in serious injury or death (§ 20001, subd. (b)(2)/count 4). The jury also found true a flight enhancement (§ 20001, subd. (c)) in count 1 and a great bodily injury enhancement (Pen. Code § 12022.7) in counts 2 and 3.

On appeal, Meza contends: (1) his convictions in counts 2 and 3 must be vacated because the offenses charged in those counts are lesser included offenses of the gross vehicular manslaughter offense he was convicted of in count 1; and (2) he is entitled to additional presentence custody credit. We find merit to these contentions, modify the judgment accordingly, and affirm as modified.

### **FACTS**

On January 31, 2015, Meza and his friend Miguel Aldaco went out drinking at two bars in Bakersfield. At approximately 2:24 a.m. the next morning, after they had parted company, as Meza drove southbound on Buena Vista Road, his car hit the curb on the center median and struck Aldaco as he stood with one foot on the median and the other on the roadway, killing him.

At 2:40 a.m., Meza called 911 from a location at the intersection of Buena Vista Road and White Lane to report that he had been the victim of a carjacking. When police officers responded to Meza's location, Meza was visibly intoxicated. The officers found Meza's car in a nearby parking lot with its front end severely damaged and its front windshield shattered, and what appeared to be blood, skin and hair in the shattered glass.

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<sup>1</sup> All further statutory references are to the Vehicle Code, unless otherwise indicated.

The officers followed a trail of oil 1.4 miles northbound on Buena Vista Road and discovered Aldaco's body in the center median and debris from a car in the median and in the roadway.

Meza failed several field sobriety tests. A breath test at 4:37 a.m. indicated that he had a BAC of .179 percent. Blood drawn from Meza at 6:00 a.m. registered a BAC of .164 percent.

On February 15, 2017, the jury rendered its verdict in this matter.

On March 16, 2017, the court sentenced Meza to an aggregate prison term of nine years: the mitigated term of four years on his vehicular manslaughter conviction, a five-year flight enhancement in that count, and stayed terms on counts 2, 3, and 4. The court also awarded Meza 39 days of presentence custody credit consisting of 34 days of presentence actual custody credit and five days of presentence conduct credit.

### **DISCUSSION**

#### ***The Offenses Meza Was Convicted of in Counts 2 and 3 Are Lesser Included Offenses of the Offense He Was Convicted of in Count 1***

Meza contends he was improperly convicted of violating section 23153, subdivision (a) in count 2 and violating section 23153 subdivision (b) in count 3, because both offenses are lesser included offenses of the vehicular manslaughter while intoxicated offense in violation of Penal Code section 191.5, subdivision (a) he was convicted of in count 1. Respondent concedes.

“In general, a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct. ‘In California, a single act or course of conduct by a defendant can lead to convictions “of *any number* of the offenses charged.” [Citations.]’ [Citation.] [Penal Code] [s]ection 954 generally permits multiple conviction.” (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227.) “But a judicially created exception to this rule prohibits multiple convictions based on necessarily included offenses.” (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034.) “ ‘ “The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily

committing another offense, the latter is a necessarily included offense.” ’  
[Citations.] For purposes of determining the propriety of multiple convictions, an offense is necessarily included if the crimes are defined in such a way as to make it impossible to commit the greater offense without also committing the lesser.” (*People v. Miranda* (1994) 21 Cal.App.4th 1464, 1467 (*Miranda*)).

Section 23153 provides:

“(a) It is unlawful for a person, while under the influence of any alcoholic beverage, to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver. [¶] (b) It is unlawful for a person, while having 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.”

Penal Code section 191.5, subdivision (a) provides:

“Gross vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, *where the driving was in violation of Section 23140, 23152, or 23153* ..., and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act that might produce death, in an unlawful manner, and with gross negligence.” (Italics added.)

In finding that driving under the influence causing injury in violation of section 23153, subdivision (a) was a lesser included offense of a violation of Penal Code section 191.5, subdivision (a), the *Miranda* court stated:

“One person who injures a person while driving under the influence commits a violation of Vehicle Code section 23153 [, subdivision (a)]; and if that person dies from that injury—whether immediately or sometime later—a violation of Penal Code section 191.5 has occurred.” (*Miranda, supra*, 21 Cal.App.4th at p. 1468.)

Although *Miranda* did not address whether a violation of section 23153, subdivision (b) is a lesser included offense of a violation of Penal Code section 191.5, subdivision (a), its reasoning applies equally to section 23153, subdivision (b) as well.

Thus, we conclude that Meza was improperly convicted in counts 2 and 3 of violating section 23153, subdivisions (a) and (b), respectively, because the offenses he was convicted of in those counts are lesser included offenses of the violation of Penal Code section 191.5 he was convicted of in count 1.

### ***The Credit Issue***

Meza contends that if his convictions in counts 2 and 3 are reversed he is entitled to additional presentence custody credit because he will no longer stand convicted of a violent felony. Respondent concedes.

Penal Code section 2933.1 provides that a defendant convicted of a violent felony shall accrue no more than 15 percent of worktime credit (Pen. Code, § 2933.1, subd. (a)) or presentence conduct credit (Pen. Code, § 2933.1, subd. (c)).

Meza's driving under the influence convictions in violation of section 23153, subdivisions (a) and (b) were violent felonies because, as to each conviction, the jury found true a great bodily injury enhancement. (Pen. Code, § 667.5 subd. (c)(8) [a violent felony includes "[a]ny felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7, ..."].) Neither of Meza's two other convictions in counts 1 and 4 qualify as violent felonies because neither of the offenses underlying these convictions is listed in section 667.5, subdivision (c), which defines violent felonies. Further, since we will reverse Meza's two violent felony convictions, he is not subject to the credit limitation provisions of Penal Code section 2933.1.

Penal Code section 4019, subdivision (f), in pertinent part, provides that "a term of four days will be deemed to have been served for every two days spent in actual custody." (Pen. Code, § 4019, subd. (f).) Therefore, based on the 34 days he was in presentence custody, Meza was entitled to 34 days of presentence conduct credit and a total of 68 days of presentence custody credit (34 days + 34 days = 68 days).

### **DISPOSITION**

Meza's convictions for driving under the influence of alcohol causing injury (Veh. Code, § 23153, subd. (a)) in count 2 and for driving with a blood-alcohol content of .08 percent or greater causing injury (Veh. Code, § 23153, subd. (b)) in count 3 are reversed and his award of presence custody credit is increased from 39 days to 68 days as calculated above. The trial court is directed to file an amended abstract of judgment that incorporates these modifications and to forward a certified copy to the appropriate authorities. As modified, the judgment is affirmed.